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IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-

MARSHALLTON-McKEAN SCHOOL DISTRICT,
Appellant,

v.

BRENDA EVANS, et al.,
Appellees.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT.

May It Please the Court:

The intervening defendant appeals from the judgment entered on 15 June 1976 of the three-judge District Court for the District of Delaware ordering the defendants to establish and implement an interdistrict desegregation plan and enjoining the enforcement of the Educational Advancement Act of 1968, 14 Del. C. §§ 1004(c)(2) and 1004(c)(4). A copy of the judgment is set out in Appendix B hereto, at page A72.

OPINIONS BELOW.

The majority and dissenting and concurring opinions in the three-judge court for the District of Delaware are not yet reported. They are set out in Appendix A hereto, at pp. A1-A71. The opinions on the interlocutory judgment of the District Court ordering the parties to submit proposed interdistrict and single-district desegregation plans for the Wilmington schools are reported at 379 F. Supp. 1218 (D. Del. 1974) and 393 F. Supp. 428 (D. Del. 1975). An appeal from the interlocutory judgment was taken to this Court, which summarily affirmed that judgment. 423 U. S. 963 (1975).

JURISDICTION.

The judgment of the three-judge court was entered on 15 June 1976. Appellant filed a Notice of Appeal on 9 August 1976. A copy of the Notice of Appeal is set out in Appendix C hereto, at page A76. This Court has jurisdiction pursuant to 28 U. S. C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Fourteenth Amendment to the Constitution of the United States:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Educational Advancement Act of 1968, 14 Del. C. §§ 1004 (c)(2), (4):

(c) On or before March 1, 1969, the State Board of Education shall meet and adopt a final plan of reorganization of school districts which it deems wise and in the best interests of the educational system of this State; provided, that no plan of reorganization of school districts shall be adopted which fails to meet the following requirements: . . .

(2) Each proposed school district including more than one component former school district shall have a pupil enrollment of not less than 1900 nor more than 12,000 in grades one through twelve. "Pupil enrollment" as used in this subsection means enrollment as of September 30, 1968. Excluding vocational-technical districts there shall be no fewer than 20 nor more than 25 reorganized school districts. . . .

(4) The proposed school district for the City of Wilmington shall be the City of Wilmington with the territory within its limits. . . .

QUESTIONS PRESENTED.

1. Can a district court in a school desegregation case validly order "interdistrict relief" where it has specifically found that the alleged "interdistrict violation" on which that relief is predicated was not "racially motivated" and there is no evidence of any "racial effect"?

2. Does the finding of a "constitutional violation" in a desegregation case license a trial court to order any remedy it thinks appropriate, or must the remedy be directed to curing the alleged wrong?

STATEMENT.

This is the latest in a long series of school desegregation decisions in the United States District Court for the District of Delaware. As the trial court noted, App. at A3, n. 7, the analogy to the Richmond litigation is strong. Indeed, it is exact, but for two distinguishing features: (1) The conclusion of the lower court here is directly in conflict with the judgment of the Court of Appeals for the Fourth Circuit in *Bradley v. School Board of the City of Richmond*, 462 F. 2d 1058 (4th Cir. 1972) (*"Richmond"*), *aff'd by equally divided Court*, 412 U. S. 92 (1973) (Mr. Justice Powell not participating), and with the decision of this Court in *Milliken v. Bradley*, 418 U. S. 717 (1974) (*"Detroit"*). (2) Unlike the Virginia situation, where the trial court charged the State with bad faith, *Richmond*, 338 F. Supp. at 92-97, the lower court here said: "The Court also takes judicial notice that in the past the State has implemented desegregation decisions in good faith." App. at A59. HEW noted that Delaware was "the first border state which had completely eradicated the dual system." 393 F. Supp. at 451 (Judge Layton dissenting).

The origins of this lawsuit go back to 1956, consequent upon the affirmance by this Court in *Brown v. Board of Education*, 347 U. S. 483 (1954), of the decision by the Supreme Court of Delaware in *Gebhart v. Belton*, 91 A. 2d 137 (Del. 1952), that "separate but equal" schools did not satisfy the requirements of the Equal Protection Clause of the Fourteenth Amendment. Despite the apparent length of this litigation, see App. at A3, n. 7, until this case was reopened in 1971 with the filing of new petitions, there was no contention ever put forward in these judicial proceedings that the schools of Wilmington, or the suburban school districts of New Castle County involved in this case, were in any way in violation of the Fourteenth Amendment.

The district court had entered its state-wide desegregation order in 1961. 195 F. Supp. at 321. Its plan called for an end to *de jure* segregation in all public schools throughout the state of Delaware, an objective which, the court itself has noted, was attained: At least since 1967, there has been no *de jure* segregation in the Delaware schools. 379 F. Supp. at 1225. The district court's 1961 plan called for the consolidation of many of Delaware's school districts. As the trial court stated, however, its plan "did not provide for the consolidation of Wilmington with any other district." *Id.* at 1221, n. 2.

In 1968, the Delaware legislature adopted a one-year school reorganization plan designed to create efficient, consolidated school districts serving controlled and limited numbers of students; it barred any local school system serving more than 12,000 pupils from entering into a consolidation. This was the Educational Advancement Act, 14 Del. C. §§ 1001 *et seq.*, which also excluded Wilmington from the predominantly rural reorganization program. In spite of the trial court's own refusal in 1961 to mandate the consolidation or dissolution of the Wilmington school district, and although it found the 1968 statute to be non-racially motivated and directed at the resolution of real organizational problems, it now holds that the legislature's omission in 1968 constituted a violation of the Fourteenth Amendment.

The factual basis for complaint here is that the Wilmington School District's student population changed between 1956, when this action was commenced, and 1973, when trial in the Wilmington phase was held, from 31.6% black to 82.7% black. 379 F. Supp. at 1228. This change was not unique to Wilmington; it was a common phenomenon in almost every central city which experienced heavy suburban growth. See U. S. Bureau of the Census, Statistical Abstract of the United States, 1974 (95th annual ed.),

at 866-67, 886-87, 906-07. But, as even the trial court acknowledged, the mere fact of racial disparity between the suburban and urban school populations cannot afford a predicate for ordering interdistrict consolidation for the purpose of alleviating the black concentration in the urban schools. Nevertheless, it did order such relief, although the only grounds it could find for doing so had been rejected by this Court in *Detroit* and by the Fourth Circuit in *Richmond*.

The trial court divided its proceedings into two aspects. The first set of hearings was concerned with the question of whether the Wilmington concentration of blacks was attributable to constitutional violations by the defendants. The second was concerned with the question of an appropriate remedy for the alleged constitutional violations.

At the end of the first phase, the trial court held that the defendants were guilty of constitutional violations, largely on the basis of the fact that the Educational Advancement Act preserved Wilmington from consolidation with other school districts. The trial court held, however, that the statute whose enforcement it enjoined was not racially motivated. See *infra* at 10-11. It also purported to find constitutional violations because of housing segregation which it attributed to the State and because in the past, before the school system was desegregated by the court's 1961 plan, there had been interdistrict violations. 393 F. Supp. at 433-438. The court, however, specifically found that each of the suburban districts concerned in this case was operating a unitary school system and none was guilty of any interdistrict violations since 1961. 393 F. Supp. at 437, n. 19, and accompanying text.

The trial court thereupon entered an interlocutory judgment ordering all parties concerned to submit both intradistrict ("Wilmington only") and interdistrict plans.

393 F. Supp. 428. Defendants appealed to this Court from that interlocutory judgment. This Court affirmed without opinion [1] over the dissent of Mr. Justice Rehnquist, who was joined by the Chief Justice and Mr. Justice Powell, all of whom thought the statute could not sustain the judgment because it was "*functus officio.*" [2] 423 U. S. 963, at 968 (1975).[3]

Following the affirmance of the interlocutory order, the trial court held hearings on the remedy, entering its final judgment on 15 June 1976. The district court ordered that all but one of the defendant school districts be collapsed into a single superdistrict. Where previously

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1. "In reviewing such interlocutory relief, this Court may only consider whether issuance of the injunction constituted an abuse of discretion. *Alabama v. United States*, 279 U. S. 229 (1929); *United States v. Corrick*, 298 U. S. 435 (1936); *United Fuel Gas Co. v. Public Service Comm'n of West Virginia*, 278 U. S. 322 (1929); *National Fire Insurance Co. of Hartford v. Thompson*, 281 U. S. 331 (1930)." *Brown v. Chote*, 411 U. S. 452, 457 (1973).

2. The three-judge court, however, has interpreted the Educational Advancement Act as still controlling the organization of the Delaware school system. Thus, in its opinion on which its final judgment is based, it attempted to conform the remedy to the demands of that statute to the extent that the court thought it possible to do so. See App. at A28-A29; A32-A34; A45-A47. In the absence of a decision by the state court to the contrary, this interpretation of the statute by the district court is controlling. *See, e.g., Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55, 74-75 (1937). If the state statute is *functus officio*, however, it can hardly serve as a predicate for the remedy devised by the trial court.

3. The judgment below from which this appeal is taken was rendered by a three-judge district court. Appeal from such a judgment lies to this Court. 28 U. S. C. § 1253. In light of the position taken by the dissenting Justices on the first appeal, however, appellants have also filed an appeal with the Court of Appeals for the Third Circuit. That appeal has been stayed pending this Court's disposition of this Jurisdictional Statement. If this Court should determine that a direct appeal is inappropriate, it could treat this Jurisdictional Statement as a Petition for Certiorari and grant the petition prior to judgment by the Court of Appeals. U. S. Supreme Court Rules, Rule 20.

there were eleven school systems, now there would be one central administration stretching over more than 250 miles of urban, suburban, and rural territory. Where previously no school district's pupil population exceeded 12,000—with the exception of Newark and Wilmington, each of which had about 15,000—now a solitary school system including both Newark and Wilmington would have to accommodate more than 80,000 widely-dispersed students. Traditional district boundary lines were abolished. This consolidation is to be effected not merely for purposes of pupil assignment, but for all functions of school government. Local school boards are to be dissolved, and with them their individualized programs of administration, finance, and curriculum, all of which were until now subject to local control. In their place now suddenly looms a new, judge-made branch of government.

Within the confines of a single school district, the State and the new school district, (which replaces the local school districts when the new district comes into existence) are to exercise their discretion as to educational, administrative, and fiscal programs.

Appeal is taken from this judgment.

THE QUESTIONS RAISED BY THIS APPEAL ARE SUBSTANTIAL.

The issues presented by this case are archetypes of those facing every major city in the United States that is or will be faced with a constitutional desegregation action. In Wilmington, as in Richmond, and as in Detroit, the center city has become increasingly black while the suburbs remain predominantly white. In Wilmington, as in Richmond, and as in Detroit, there is found to be a failure by government to dissipate housing patterns that reflect urban racial separations. Cf. *Hills v. Gautreaux,* — U. S. — (1976), 44 USLW 4480. Just as the Wilmington case does not differ from the Richmond and Detroit cases, it will not be different from those brought or to be brought in almost any large-sized city of the United States. Certainly the time has come when it is appropriate for the Court to decide, one way or another, whether this factual situation permits a trial court to dissolve the existing local governmental units, replace them with one of a court's own creation, and order the dissemination of the children among all the schools in the judicially-created district. While we think it clear that this Court has already forbidden such judicial action, the court below ordered a solution inconsistent with this Court's prior decisions. The issues will not be put to rest until this Court speaks authoritatively once more. Even a reversal of this Court's decision in *Milliken* is to be preferred to the uncertainty that now reigns, an uncertainty that spawns social conflict.

I. There Is No Constitutional Violation on Which to Predicate Interdistrict Relief.

A. In Holding That There Was a Constitutional Violation in the Absence of "Discriminatory Racial Purpose," the Trial Court's Decision Is in Conflict With the Decision of This Court in *Washington v. Davis* and the Decision of the Court of Appeals for the Fourth Circuit in *Bradley v. Richmond.*

The finding of a constitutional violation by the district court rests largely on the proposition that the Educational Advancement Act inhibited the integration of the school children of Wilmington with those in other school districts. The trial court's proposal is hard to state, since there are neither facts nor argument to sustain the conclusion that in the absence of the Educational Advancement Act such integration of districts would have occurred.

The boundaries of the Wilmington school district are coterminous with the boundaries of the City of Wilmington and have been since 1905. Between 1905 and the ruling below, there has never been a suggestion that the school boundaries be amended to remove portions of the Wilmington district or add to it. Nevertheless, the trial court held that the Educational Advancement Act by excluding Wilmington from the statutory program of consolidating small school districts—no one had advocated its inclusion—constituted a violation of the Equal Protection Clause of the Fourteenth Amendment. "This Court ruled that the exclusion of Wilmington from the process of reorganization by statute was an unconstitutional racial classification, and 'contributed to the separation of races by . . . redrawing [*sic*] district lines.'" App. at A6.

This holding is in direct conflict with that of the Fourth Circuit where the same contention was made about the failure of the State to redraw the boundary lines of the city and school district of Richmond. *Bradley v. School Board of the City of Richmond*, 462 F. 2d 1058, 1067 (4th Cir. 1972), aff'd by equally divided Court, 412 U. S. 92 (1973).[4]

The holding below is more egregious, however, because the trial court itself held that the legislature had no discriminatory purpose or motive in passing the legislation in question. "It is true that in the last opinion we refused to hold that the Educational Advancement Act was passed for racially discriminatory purposes." App. at A55. The fact is that the trial court had held directly that there was no such motive or purpose (393 F. Supp. at 439):

> We cannot conclude, as plaintiffs contend, that the provisions excluding the Wilmington District from school reorganization were purposefully racially discriminatory. To be sure, all legislators in Delaware in 1968 knew that Wilmington had a large black population, and most legislators may have known that the Wilmington School District was predominantly black. On the other hand, the focus of the legislature's con-

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4. The similarity of the Virginia statute and the Educational Advancement Act is striking:

> Under the new Constitution of Virginia the State Board is given power to divide the Commonwealth into school divisions subject to "such criteria and conditions as the General Assembly may prescribe." At its extra session of 1971, the General Assembly enacted into law Virginia Code § 22-30:
>
> (1) No school division shall be composed of more than one county or city.
>
> (2) No school division shall be composed of a county or city and any one of the following towns: Abingdon, Cape Charles, Colonial Beach, Fries, Poquoson, Saltville, or West Point. [462 F. 2d at 1067.]

> cern in developing the consolidation provisions of the Educational Advancement Act was on small, weak, ineffective school districts, and while the effectiveness of schooling in Wilmington at this time has been disputed, it is clear that Wilmington had larger staffs and better programs than many Delaware school districts. Moreover, Wilmington had historically been treated distinctively in Delaware education, and there is evidence that its representatives were unwilling to forego certain aspects of this special treatment. No language in the provisions at issue makes any reference to race, nor evidently, did the legislative debates over the Act contain any reference to race. Finally, all Wilmington legislators, black and white, voted for the Educational Advancement Act. In short, the record does not demonstrate that a significant purpose of the Educational Advancement Act was to foster or perpetuate discrimination through school reorganization. Effective, as well as intentional racial classifications, however, require special scrutiny under the Equal Protection Clause.

Thus, the judgment of the court below is in square conflict with the decisions of this Court as to the necessity for purposeful discriminatory action as a predicate for judicial relief. In *Washington v. Davis,* — U. S. — (1976), 44 USLW 4789, 4791-4792, this Court said:

> Because the Court of Appeals erroneously applied the legal standards applicable to Title VII cases in resolving the constitutional issue before it, we reverse its judgment in respondents' favor. Although the petition for certiorari did not present this ground for reversal, our Rule 40(1)(d)(2) provides that we "may notice a plain error not presented," and this is an appropriate occasion to invoke the rule. . . .

The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. . . . But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact. . . .

The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of de jure segregation is "a current condition of segregation resulting from intentional state action . . . the differentiating factor between de jure segregation and so-called de facto segregation . . . is *purpose* or *intent* to segregate." *Keyes v. School District No. 1,* 413 U. S. 189, 205, 208 (1973). See also *id.,* at 199, 211, 213. The Court has also recently rejected allegations of racial discrimination based solely on the statistically disproportionate racial impact of various provisions of the Social Security Act because "the acceptance of appellant's constitutional theory would render suspect each difference in treatment among the grant classes, however lacking the racial motivation and however rational the treatment might be." *Jefferson v. Hackney,* 406 U. S. 535, 548 (1972). And compare *Hunter v. Erickson,* 393 U. S. 385 (1969), with *James v. Valtierra,* 402 U. S. 137 (1971).

The key analytical pronouncement of the trial court in the present case is sharply dissonant from the teaching of this Court in *Washington v. Davis, supra,* 44 USLW at 4793, where the Court said:

> [W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.

Contrast this Court's manifest restraint in *Washington v. Davis,* where it refused to rewrite a facially-valid and racially-neutral law, with the cavalier approach toward cause and effect which characterizes the pattern of decision below in the case at bar:

> Whether or not the Board would have been required to adopt a desegregation plan beyond the boundaries of Wilmington in the absence of the Educational Advancement Act, it is clear that the Act made consolidation promoting racial balance substantially less accessible than other educational strategies. Because the Educational Advancement Act, racially neutral on its face, had a significant racial impact on the policies of the State Board of Education, it constitutes a suspect classification. (393 F. Supp. at 442-443.)

The trial court in this case has thus determined to find a constitutional violation, while at the same time admitting that it can find no racially-discriminatory purpose behind any of the conduct of the Delaware schools. This should suffer the same disapprobation voiced by this Court in *Washington v. Davis, supra,* 44 USLW at 4793-4794:

> [T]o the extent that those [lower court] cases rested on or expressed the view that proof of racially dis-

criminatory purpose is unnecessary in making out an equal protection violation, we are in disagreement.

The court below is guilty, therefore, of such plain error that in *Washington v. Davis* invoked this Court's review even though the issue had not been raised. The rejection of the requirement of intentional racial discrimination is a rejection of this Court's reading of the Constitution and calls for review and reversal here.

B. In Holding That Evidence of Segregatory Housing Practices Constituted a "Constitutional Violation" Justifying an Interdistrict Remedy, the Decision Below Is in Conflict With This Court's Decision in *Milliken* and the Fourth Circuit's Judgment in *Richmond*.

The ruling of the trial court that "the racial identifiability of the suburbs and the city" were attributable to the State "through enforcement of racial covenants, zoning and encouragement and support of private discrimination in housing" (App. at A18; 393 F. Supp. at 437-38), parallels the conclusions of the trial courts in the *Detroit* and *Richmond* cases, although there was even less evidence in this case to support that conclusion. See *Detroit*, 338 F. Supp. at 587; *Richmond*, 338 F. Supp. at 212-29. This Court has demanded a more careful distinction between the conduct of school authorities and the behavior of private persons, as they might give rise to a public school system's liability for a constitutional violation, than the court below has drawn. In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 23 (1971), this Court said:

> Our objective in dealing with the issues presented by these cases is to see that school authorities exclude

> no pupil of a racial minority from any school, directly or indirectly on account of race; it does not and cannot embrace all the problems of racial prejudice even when those problems contribute to disproportionate racial concentrations in some schools.

In *Detroit,* this Court found no adequate evidence to support an interdistrict remedy on the basis of the housing practices asserted. Mr. Justice Stewart's opinion, on which the trial court relied for finding liability on the basis of housing discrimination, said of the *Detroit* record—at least as strong for plaintiffs as this one: "No record has been made in this case showing that the racial composition of the Detroit school population or that residential patterns within Detroit and in the surrounding areas were in any significant measure caused by governmental activity." [5] (418 U. S. at 756, n. 2). The Fourth Circuit was firm in

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5. A strong advocate of the "metropolitanism" for school desegregation recognized that the evidence in *Detroit* on housing violations is as strong as you are likely to get. He would abolish the need for evidence of causation between housing separation and school desegregation. He recognizes, but abhors, the Court's unwillingness to create a presumption of causation. But only if the Court overrules its earlier positions in *Detroit* and *Richmond* can the conclusion by the court below be allowed to stand. "One must remember that the *two* metropolitan cases to reach the Supreme Court, Richmond, Virginia, as well as Detroit, did contain considerable material along several of these lines of evidence. For example, the record of the *Richmond* case, in which Justice Stewart apparently also rejected a metropolitan remedy, was replete with evidence concerning naked discrimination against blacks seeking housing in the two involved counties. . . . Recall, too, the extreme degree of housing segregation by race that typifies the Detroit metropolitan area." Pettigrew, *A Sociological View of the Post Milliken Era,* in *Milliken v. Bradley:* The Implications for Metropolitan Desegregation, Conference before the United States Commission on Civil Rights 62 (Washington, D. C. 1974). Pettigrew, of course, is an advocate of metropolitanism who supplied the evidence as plaintiff's expert in the *Richmond* case, and not an unbiased observer.

rejecting the sufficiency of this kind of evidence to support an interdistrict remedy by integrating disparate school districts. See 462 F. 2d at 1066.

The lower court would place much reliance on the case of *Hills v. Gautreaux,* — U. S. — (1976), 44 USLW at 4487, as in effect overruling the conclusion in *Milliken* that housing violations do not justify school system reorganizations such as was ordered here. It rather reaffirmed *Milliken* than overruled it:

> In contrast to the desegregation order in [the *Milliken*] case, a metropolitan relief order directed to HUD would not consolidate or in any way restructure local governmental units. The remedial decree would neither force suburban governments to submit public housing proposals to HUD nor displace the rights and powers accorded local government entities under federal or state housing statutes or existing land use laws. The order would have the same effect on the suburban governments as a discretionary decision by HUD to use its statutory powers to provide the respondents with alternatives to the racially segregated Chicago public housing system created by CHA and HUD.

In this case, of course, the full purpose and effect of the final decree is to destroy existent local school districts and replace them with "a vast new super school district." *Milliken,* 418 U. S. at 743. The lower court's judgment is, therefore, not only in conflict with the *Milliken* decision by this Court, with the *Richmond* decision by the Court of Appeals for the Fourth Circuit, but also with this Court's decision in *Hills v. Gautreaux.*

The importance of boundary lines and local control of the educational process were noted by this Court in *Milliken v. Bradley,* 418 U. S. 717, 742:

> "Boundary lines may be bridged where there has been a constitutional violation calling for interdistrict relief, but the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. See Wright v. Council of the City of Emporia, 407 U. S., at 469, 92 S. Ct., at 2206. Thus, in San Antonio Independent School District v. Rodriguez, 411 U. S. 1, 50, 93 S. Ct. 1278, 1305, 36 L. Ed. 2d 16 (1973), we observed that local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages "experimentation, innovation, and a healthy competition for educational excellence."

II. The Remedy Afforded by the Trial Court Exceeded Its Authority Under the Decisions of This Court.

A. In the Absence of an "Interdistrict Violation," No "Interdistrict Remedy" May Be Imposed by a Federal Trial Court.

There can be no quarrel with the proposition that there must be an interdistrict violation to justify an interdistrict remedy. The Court made that requirement clear in *Milliken* (418 U. S. at 744-45):

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the

> separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district, have been a substantial cause of interdistrict segregation.

The decision below is inconsistent with this Court's ruling. There is no question but that the suburban districts have not committed any segregative acts on which to base an interdistrict remedy. Their innocence is proclaimed by the court below. See 393 F. Supp. 437, note 19. Nor is there any constitutional interdistrict violation that may be attributed to the State Board.

Assuming arguendo, however, that the Educational Advancement Act or the failure to provide public housing in the suburbs constituted an interdistrict violation, there is no showing in this record that these "racially discriminatory acts . . . have been a substantial cause of interdistrict segregation." "It is, indeed, a novel application of equitable power—not to mention a dubious extension of constitutional doctrine—to require so much greater a degree of forced school integration than would have resulted from purely natural and neutral nonstate causes." (Powell, J., concurring in part and dissenting in part, *Keyes v. Denver School District No. 1*, 413 U. S. 189, 249 (1973)).

The minority opinion below clearly delineated the absence of any showing that the alleged violations could have been "a substantial cause of interdistrict segregation" (App. at A65-A66):

In this connection, [the majority] applied a sort of "but-for" test; that is, "but-for" the failure of the housing authorities to build cheap, low-cost housing in the County and "but-for" the EAA which tended to lock large numbers of Black students into Wilmington, the ratio of school children in the Wilmington schools today would be 80% White and 20% Black instead of 9.8% White and 84.7% Black. From this, and allowing a variable factor of 15%, it arrived at the conclusion that in desegregating Northern New Castle County, the number of Black students in any one school should not be less than 10%, nor exceed 35%. I simply cannot accept the majority's hypothesis. No testimony was put into the record in support of the conclusion that "but-for" the constitutional violation, Wilmington schools would still be 80% White and 20% Black. No evidence as to the number of available City, as compared with suburban, jobs was adduced. The record contains no prediction as to how many housing units would now be available to Blacks in the suburbs, had the housing authorities presented a vigorous, low-cost housing program. There is no analysis of the transportation available to Blacks who might rent low-cost housing. Nor has the recognized tendency of ethnic groups to live together in certain localities been taken into account. I concede that "but-for" the weak housing program and the unconstitutional feature of the EAA, there would be fewer Blacks today in the City but I doubt if the difference would be substantial, and in any case, there is no evidence indicating how these numbers could be calculated. As I view it, the result drawn by the majority from its "but-for" test represents no more than a bald assumption unsupported by evidence.

What the minority opinion did not point out was that there is no evidence that in the absence of EAA Wilmington would ever have been consolidated with other school districts. Indeed, the majority acknowledged that, "the record does not suggest that, but for the statutory exclusion from its reorganization authority, the State Board would necessarily have consolidated Wilmington with any other district." 393 F. Supp. at 442, n. 28. Wilmington was already by far one of the two largest school districts in the State; it already had greater fiscal support both from the State and the City than any other school district; it already had more teachers per student, more specialized programs, and a higher salary structure. The boundaries of the Wilmington school district have not been altered since 1905. There is nothing in the record to suggest that they would have been altered "but-for" the EAA.

This Court clearly stated in *Milliken,* in reliance on *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 16 (1971), that the remedy should be confined to curing the wrong (418 U. S. at 744-746):

> The controlling principle consistently expounded by our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. . . . the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.

This controlling principle was ignored by the lower court. There is no connection between the remedy adduced and the constitutional violations alleged. This is because the "constitutional violations" cannot be shown to have in any way contributed to the alleged segregation found by the trial court.

B. In Destroying the Existent School Systems and Establishing Its Own Consolidated System, the Court Below Rejected the Decisions of This Court in *Milliken v. Bradley* and *Hills v. Gautreaux*.

The trial court undertook by way of remedy for some dubious constitutional violations a restructuring of the school systems of a major portion of the State of Delaware.[6] It did this in the face of this Court's commands against interference with local government units except to the extent absolutely necessary. As in *Milliken* (418 U. S. at 740):

> [The court below] proceeded on an assumption that the [Wilmington] schools could not be truly desegregated—in their view of what constituted desegregation—unless the racial composition of the student body of each school reflected the racial composition of the population of the metropolitan area as a whole.

As did the lower courts in *Milliken*, the lower court here determined that "the entire northern New Castle area must be treated as one community in terms of its population characteristics, because that is the way it was perceived and treated by the State and its citizenry." App. at A18. There is, of course, no showing that the northern New Castle area was ever treated as one community, any more than every urban-suburban complex, as in *Detroit* and *Richmond*, is so treated.

The trial court converted its tenuous finding of liability for a constitutional violation into a license for the wholesale reconstruction of a significant part of Delaware's local

6. In the recently completed school year (1975-76), for example, the judicially-created super-district would have enrolled more than 63% of the students in the public schools of the entire state of Delaware. D. D. I. Remedy Ex. 25.

government. The court below chose to ignore the mandates of Delaware's constitution and state laws in favor of its own conviction of the propriety or utility of a "superdistrict," something which this Court has said that trial courts are not qualified to do:

> This is a task which few, if any, judges are qualified to perform and one which would deprive the people of control of schools through their elected representatives. (*Milliken*, 418 U. S. at 744.)

The trial court purported to derive its authority for this restructuring of the public school system of Delaware from this Court's decision in *Hills v. Gautreaux, supra,* 44 USLW at 4484, n. 13. Nothing could be clearer from the language of that opinion than that it afforded no such authority:

> Although the State of Michigan had been found to have committed constitutional violations contributing to racial segregation in the Detroit schools, 418 U. S., at 734-735, n. 16, the Court in *Milliken* concluded that the interdistrict order was a wrongful exercise of judicial power because prior cases had established that such violations are to be dealt with in terms of "an established geographic and administrative school system," *id.*, at 746, and because the State's educational structure vested substantial independent control over school affairs in the local school districts. See *id.*, at 742-744. In *Milliken*, a consolidation order directed against the State would of necessity have abrogated the rights and powers of the suburban school districts under Michigan law. See *id.*, at 742 n. 20. Here, by contrast, a metropolitan area remedy involving HUD need not displace the rights and powers accorded suburban governmental entities under federal or state law.

CONCLUSION.

The decree below should be reviewed and reversed for the same reasons that the Detroit interdistrict remedy judgment was reviewed and reversed. In the words of this Court in *Hills v. Gautreaux, supra,* 44 USLW at 4483:

> The desegregation order [here] requiring the consolidation of local school districts in the [Wilmington] metropolitan area thus constituted direct federal judicial interference with local governmental entities without the necessary predicate of a constitutional violation by those entities or of the identification within them of any significant segregative effects resulting from the [Wilmington] school officials' unconstitutional conduct. Under these circumstances, . . . the interdistrict decree was impermissible because it was not commensurate with the constitutional violation to be repaired.

Respectfully submitted,

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APPENDIX A.

We adopt and incorporate by reference Appendix A to the Jurisdictional Statement filed by the Delaware State Board of Education in support of its appeal from the decision of the District Court below.

We respectfully call to the Court's attention, however, the error in the appendix at page A-71. The Honorable Caleb R. Layton's name, rather than that of the Honorable Caleb M. Wright, should appear.

APPENDIX B.

We adopt and incorporate by reference Appendix B to the Jurisdictional Statement filed by the Delaware State Board of Education in support of its appeal from the decision of the District Court below.

APPENDIX C.

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IN THE
UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

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Civil Action Nos. 1816-1822

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BRENDA EVANS, et al.,

Plaintiffs,

v.

MADELINE BUCHANAN, et al.,

Defendants.

Notice of Appeal to the Supreme Court of the United States.

Notice is hereby given that Defendant, Marshallton-McKean School District, a Defendant in the above-entitled action, hereby appeals to the Supreme Court of the United States from the Final Order against the Defendant entered in this action on June 15, 1976.

This appeal is taken pursuant to 28 *U. S. C.* § 1253.

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